

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,473

JOSEPH ISAAC,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

**Appeal from the United States District Court
for the District of Columbia**

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United States Court of Appeals

For the

District of Columbia Circuit

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Joseph W. Stewart

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No. 13,473

QUESTIONS PRESENTED

In the opinion of the appellee the following questions are presented:

1. Whether a dismissal of an indictment, before the jury is empanelled or testimony received, bars the Government from proceeding under a new indictment for the same offense.
2. Whether the Harrison Narcotic Act, as amended in 1953, whose provisions are within the power of Congress to lay taxes, is unconstitutional as invading police power reserved to the States.
3. Whether the legislative presumption of importation from possession of heroin has been repealed by implication by the mere theoretical possibility of synthesizing the drug.

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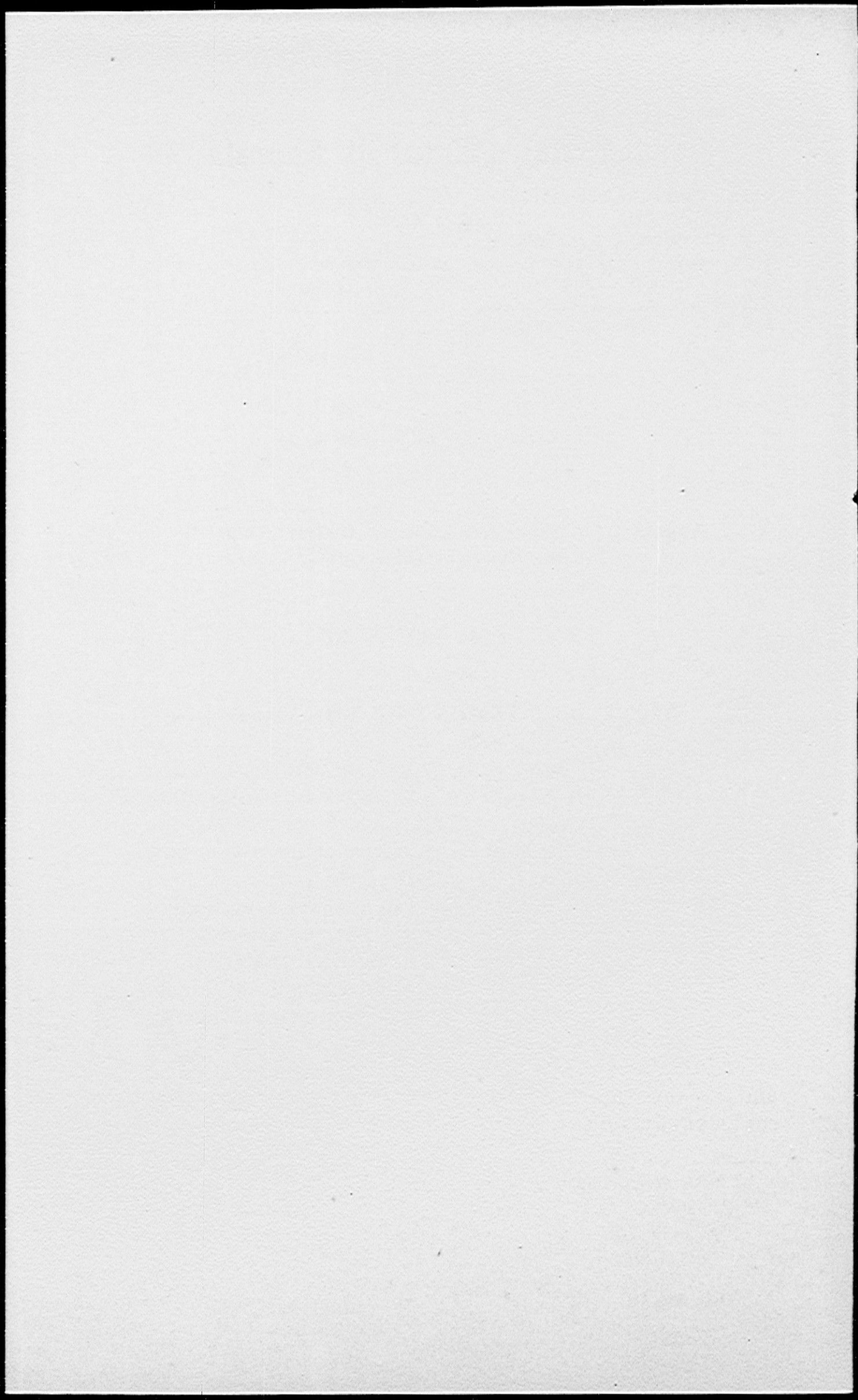
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v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On April 23, 1956, an eleven count indictment was filed in the District Court charging appellant and co-defendant Catherine Hopkins with violating the Federal Narcotic Laws.¹ Counts One, Four, and Seven charged the sale, barter and exchange of narcotics not in pursuance of a written order, written for that purpose, in violation of Section 2 of the Harrison Narcotic Act, as amended, 26 U.S.C. § 4705(a). Counts Two, Five, Eight, and Ten of the indictment charged the sale and distribution of narcotics not in or from the original stamped package in violation of Section 1 of the Harrison Narcotic Act, as amended, 26 U.S.C. § 4704(a). Counts Three, Six, Nine, and Eleven charged the concealment and sale of narcotics known to have been illegally imported in violation

¹ U.S. District Court Criminal Number 435-56.

of the Narcotic Drugs Import-Export Act, as amended, 21 U.S.C. § 174 (J.A. 1a-4a).

The first three counts of the indictment related to the sale, possession, and concealment of fifteen capsules of heroin by appellant on July 22, 1955. Counts Four, Five and Six related to the sale, possession and concealment of thirty capsules of heroin by appellant on July 24, 1955. Counts Seven, Eight and Nine related to the sale, possession and concealment of fifth capsules of heroin by appellant on July 28, 1955. Counts Ten and Eleven related to the possession and concealment of fifty-four capsules of heroin by appellant and co-defendant Hopkins on December 12, 1955.

Upon arraignment appellant pleaded not guilty to all counts (R. 5). His motion to dismiss the first nine counts of the indictment, filed May 22, 1956, was denied (R. 9).²

Appellant was tried by jury and found guilty as charged (R. 10) and judgment of conviction was entered sentencing him to imprisonment for a period of one to five years and a fine of \$100 on Counts One, Four, Seven, and Ten, to run consecutively and a like sentence on the remainder of the counts, to run concurrently with each other and with the sentences imposed in the prior counts (J.A. 8a).³

² An indictment filed on February 6, 1956, in U.S. District Court Criminal Case No. 155-56, charged appellant and co-defendant Hopkins with the exact transactions as the instant (April 23rd) indictment except that the indictment in Crim. No. 155-56 charged only co-defendant Hopkins with narcotic violations on December 12, 1956, (Counts 10 and 11 of both indictments) whereas the instant indictment charged *both* co-defendant Hopkins and appellant with the December 12th violations.

The prior indictment, Crim. No. 155-56, was dismissed in open court upon the oral motion of the U.S. Attorney on May 9, 1956, before the petit jury panel was sworn or any testimony taken and subsequent to the filing of the instant indictment.

³ Co-defendant Hopkins was found to be mentally ill and incompetent to understand the charges against her. Pursuant to Title 23, Section 301 of the District of Columbia Code, the trial court ordered her committed to Saint Elizabeths Hospital.

STATUTES INVOLVED

Title 26, United States Code, Section 4704 (a) provides:

It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found.

Title 26, United States Code, Section 4705 (a) provides:

It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate.

Title 21, United States Code, Section 174 provides:

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be fined not more than \$2,000 and imprisoned not less than two or more than five years. * * *

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

Title 26, United States Code, Section 4731 (a) provides:

The words "narcotic drugs" as used in this part shall mean any of the following, whether produced directly or indirectly by extraction from substances

of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

- (1) Opium, isonipecaine, coca leaves, and opiate;
- (2) Any compound, manufacture, sale, derivative, or preparation of opium, isonipecaine, coca leaves, or opiate;
- (3) Any substance (and any compound, manufacture, salt, derivative, or preparation thereof) which is chemically identical with any of the substances referred to in clauses (1) and (2).

SUMMARY OF ARGUMENT

I

An order of dismissal entered under Rule 48 (a) of the Federal Rules of Criminal Procedure is still only the "nolle prosequi" of common law as distinguished from a dismissal with prejudice. Thus, in the instant case the dismissal of the first indictment, prior to the time of empanelling a jury or taking testimony, did not bar the right of the Government to proceed under the second indictment.

II

The rationale of the Supreme Court cases holding the Harrison Narcotic Act as a valid exercise of the power of Congress to lay taxes was not affected by the 1953 amendment. No original state right is invaded because the legislation may incidentally discourage the illegal use of the taxed narcotics.

III

The legislative presumption of importation from possession of heroin has not been repealed by implication by the mere theoretical possibility of synthesizing the drug. Opium is still not a domestic product and the permitted inferences are still sufficiently reasonable.

ARGUMENT

I

**The Trial Court Properly Denied Appellant's Motion
To Dismiss Part Of The Indictment**

Appellant made a motion in the district court to dismiss counts one through nine of the indictment on the grounds that a prior indictment that charged appellant with the same narcotic transactions was dismissed at the instance of the Government, thereby terminating the prosecution (J.A. 5a). The denial of this motion constitutes the basis for his first claim of error.

Rule 48(a) of the Federal Rules of Criminal Procedure permits the United States Attorney, by leave of court, to file a dismissal of an indictment. The prior indictment, on Criminal Number 155-56, was dismissed at the instance of the United States Attorney, before a petit jury was empaneled and sworn or testimony taken and after appellant and co-defendant Hopkins were re-indicted for substantially the same offenses.

An order of dismissal entered under Rule 48(a) is still only the "nolle prosequi" of common law as distinguished from a "dismissal with prejudice" and as such does not forbid proceeding on a second indictment on the same charges. *Spriggs v. United States*, 225 F. 2d 865 (9th Cir. 1955).

This Court in *District of Columbia v. Buckley*, 75 U.S. App. D.C. 301, 128 F.2d 17 (1942)⁴ said that "it is elementary that an indictment may be dismissed and the defendant reindicted for the same offense, if he had not been put in jeopardy."

At the time the prior indictment was dismissed in the principal case the trial had not commenced—a petit jury had not been empanelled or any testimony taken, and

⁴ Cited with approval recently in *United States v. Potishman*, 230 F.2d 271 (5th Cir. 1956). See also *Buie v. United States*, 76 F.2d 848 (5th Cir. 1935), *cert. denied*, 296 U.S. 585, and *United States v. Fox*, 130 F. 2d 56 (10th Cir. 1942) *cert. denied*, 317 U.S. 666.

Appellant urges this Court, in effect, to apply the rule as to acquittal to the termination of proceedings by a dismissal or nolle prosequi. This is a very considerable step which no court is called upon to take, either by reason or by authority.

Thus under either doctrine, former jeopardy or res judicata, the dismissal of the first indictment in no way barred the right of the Government to proceed under a new indictment on similar charges.

II

Harrison Narcotic Act, As Amended, Does Not Invade Police Power Reserved To The States

Appellant urges that the 1953 amendment, 26 U.S.C. § 4731 (a), rendered the Harrison Narcotic Act unconstitutional; that it is an attempt of Congress to exercise police power by prohibiting traffic in narcotics.

Similar contentions were made in the early history of the Harrison Narcotic Act. As originally enacted, Section 1 of the Act imposed only a nominal occupational tax. 38 Stat. 785 (1914); however, in 1919 the occupational tax rates were raised and a stamp tax was added [now codified in 26 U.S.C. § 4701 (a), 4771] and a provision added penalizing transactions not in or from the original stamped package [40 Stat. 1130 (1919), now codified as 26 U.S.C. § 4704(a)]. The Supreme Court, in upholding Section 1 of the Harrison Narcotic Act said in *Alston v. United States*, 274 U.S. 289, 47 S.Ct. 634, 71 L.Ed. 1052 (1927):

"The present cause arises under those provisions of § 1 which imposed a stamp tax on certain drugs and declare it unlawful to purchase or sell them except in or from original stamped packages. These provisions are clearly within the power of Congress to lay taxes and have no necessary connection with any requirement of the Act which may be subject to reasonable disputation. They do not absolutely prohibit buying or selling; have produced substantial revenue; contain nothing to indicate that by colorable use of taxation Congress is attempting to invade the

reserved powers of the States. The impositions are not penalties.”

The crime of transferring narcotics not in pursuance of a written order on a form emanating from the Treasury [now codified as 26 U.S.C. § 4704(a)] was contained in Section 2 of the original act of 1914. The constitutionality of Section 2 as a taxing measure was upheld in *United States v. Doremus*, 249 U.S. 86, 39 S.Ct. 214, 63 L.2d 493 (1919) where in Supreme Court said (240 U.S. 94):

“Nor is it sufficient to invalidate the taxing authority given to Congress by the Constitution that the same business may be regulated by the police power of the state.

The act may not be declared unconstitutional because its effect may be to accomplish another purpose as well as the raising of revenue. If the legislation is within the taxing authority of Congress—that is sufficient to sustain it.

* * *

We cannot agree with the contention that the provisions of § 2, controlling the disposition of these drugs in the ways described, can have nothing to do with facilitating the collection of the revenue.”

And in *Nigro v. United States*, 276 U.S. 332, 48 S.Ct. 388, 72 L.Ed 600 (1928) it was said (276 U.S. at 344, 354):

“It would seem to be admissible and wise in a law seeking to impose taxes for the sale of an elusive subject to require conformity to a prescribed method of sale and delivery calculated to disclose or make more difficult any escape from the tax.

* * *

Congress does not exceed its power if the object is laying a tax and the interference with lawful purchasers and users of the drug is reasonably adapted to securing the payment of the tax. Nor does it render such qualification or interference with the original state right an invasion of it because it may incidentally discourage some in the harmful use of the thing taxed.”

In 1953 Congress amended the stamp tax provision of

the Harrison Narcotic Act so that the tax is now imposed on "narcotic drugs" instead of on "opium", "coca leaves", etc. 67 Stat. 505 (1953), 26 U.S.C. § 4701 (a) [then codified as § 2550 of Title 26]. Section 4731(a) was added to Title 26 of the United States Code. This section states that the words "narcotic drugs" mean any of the drugs as innumeraled:⁵

... whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis.

This addition, appellant claims, violates Article 10 of the Constitution by making "possession of these matters impressed in 26 U.S.C. 4731(a) a crime even though produced in any of the States"; that the sole purpose of the amendment was that of exercising police power (Br. 10, 11).⁶

The report of the committee recommending enactment of the amendment⁷ set out the purpose of the legislation as follows:

The sole purpose of H. R. 5561 is to make it clear

⁵ For full text see "Statutes Involved" *supra*.

⁶ Appellant's attack seems to be directed to the statutory presumptions which permit convictions arising from possession of narcotics. He was convicted of three counts (1, 4, and 7) for violating 26 U.S.C. § 4705(a) which does not contain any such statutory presumption but demands affirmative proof that the exchange of narcotics was not in pursuance of a valid written order. 26 U.S.C. § 4704(a) does permit a conviction based upon unexplained possession of narcotics that are void of tax stamps but it does not concern itself with the nature of the narcotic drug and therefore this "synthetic addition" of 1953 would not affect its validity and it remains "legal, reasonable and constitutional". *Goode v. United States*, 80 U.S. App. D.C. 67, 149 F.2d 377 (1945); *Casey v. United States*, 276 U.S. 413, 48 S.Ct. 373, 72 L.Ed 632 (1928); *Maynard v. United States*, 94 U.S. App. D.C. 347, 215 F.2d 336 (1954). As to the effect the new amendment has on the inferences permitted by Narcotic Import-Export Act, see Argument III, *infra*.

⁷ Senate Report No. 676, 83rd Congress, 1st Session (1953) which repeated in substance House Report No. 859. See U.S. Code Cong. and Adm. News. 1953, p. 2277.

that chemically synthesized morphine, cocaine, and other narcotic drugs are covered by existing provisions of law in the same manner, and to the same extent, as are those narcotic drugs which are produced from natural sources.

Thus the primary purpose of the amendment was to make the narcotic laws applicable to any substances chemically identical with the prohibited narcotics. The legislation unquestionably aids criminal enforcement of the Harrison Narcotic Act by making it unnecessary for the Government to affirmatively prove that the contraband was derived from natural sources.

The amendment, however, did not in any way affect the Harrison Narcotic Act as a revenue measure, for as prior to the amendment, the tax imposed is upon narcotic drugs, "produced in or imported into the United States" Cf. 26 U.S.C. § 2550 (a) (1939); now codified in 26 U.S.C. § 4701 (a) (1953). If Congress has the power to tax narcotics produced in or imported into the United States, it certainly has a like power to tax synthetic narcotics, so produced. It necessarily follows that Congress may, as before, require that distribution of such narcotic drugs (including synthetics) be in or from the original stamped package and in pursuance of a legal written order. Both requirements still bear a reasonable relation to the enforcement of the tax imposed.

The rationale of the *Alston*, *Doramus*, and *Nigro* cases, *supra*, are still applicable to uphold the validity of the Harrison Narcotic Act as a legitimate exercise of the taxing authority granted Congress by the Constitution. Everything in the construction of Section 1 and 2 of the Act is directed toward the collection of taxes. Narcotic drugs may be easily concealed and the use of the drug for other than medicinal purposes leads to addiction and causes the addicts to resort to cunning and deceitful ways to obtain such drugs. Section 1, by requiring tax stamps, and Section 2, by requiring a written order, aids to prevent and discover evasion of the tax. In this manner narcotic traffic is kept aboveboard and subject to inspection by those authorized to collect the taxes. The

opportunity of unauthorized persons to obtain narcotic drugs and sell them clandestinely without paying the tax imposed has been considerably lessened.

The discretion of Congress to tax narcotic activities is not destroyed because it may incidentally discourage the illegal and harmful use of the narcotic drugs. This effect should not render the Harrison Narcotic Act void as an infringement on state police power as its provisions, as indicated, are primarily calculated to sustain the revenue features. Thus, the construction put upon the Act before the 1953 Amendment should remain the same.

III

The Legislative Presumption Of Importation From Possession Of Narcotic Drugs Has Not Been Repealed By Implication

Appellant extended his blanket claim of unconstitutionality to include the Narcotic Drugs Import-Export Act, 21 U.S.C. § 174. Appellant's sentence for violating the Import-Export Act ran concurrent with the penalty imposed for violation of the Harrison Narcotic Act;⁸ therefore, this Court need not reach the claims of error relating to 21 U.S.C. § 174 if the conviction under the Harrison Narcotic Act is valid. *Hirabayshi v. United States*, 320 U.S. 81 (1943); *Wanzer v. United States*, 93 U.S. App. D.C. 412, 208 F.2d 45 (1953); *Jackson v. United States*, 94 U.S. App. D.C. 71, 214 F.2d 240, cert. denied, 347 U.S. 1021; *Matthews v. United States*, — U.S. App. D.C. —, (No. 13,366, January 31, 1957).

In any event, the conviction under 21 U.S.C. § 174 was valid. Counts 3, 6, 9 and 11 of the indictment charged that appellant on four separate days facilitated the concealment and sale of a narcotic drug, after the drug had been imported into the United States, with the knowledge

⁸ Appellant was convicted on eleven counts. His sentence under Count 1, 4, 7, (26 U.S.C. 4705(a) violations) and count 10 (26 U.S.C. 4704(a) violations) run consecutively and like sentences under the remaining counts run concurrent with the prior counts.

of appellant. Assuming that the Government relied solely on proof that appellant possessed the narcotics on the days specified in order to establish the illegal importation of the outlawed drugs, once the jury found such possession in appellant as a fact, it was in a position to find him guilty of violating 21 U.S.C. § 174—which it did.⁹ *Bates v. United States*, 95 U.S. App. D.C. 57, 219 F.2d 30 (1955). *United States v. White*, 228 F.2d 832 (7th Cir. 1956). The inferences arising under the statute that narcotics in any one's possession were illegally imported and that the possessor was aware of illegal importation are sufficiently reasonable that the statute is not thereby rendered unconstitutional. *Yee Hem v. United States*, 268 U.S. 178, 69 L.Ed. 904, 45 S. Ct. 407 (1925); *United States v. Moe Liss*, 105 F.2d 144 (2nd Cir. 1939); *Dear Check Quong v. United States*, 82 U.S. App. D.C. 8, 160 F.2d 251 (1947); *Maynard v. United States*, *supra* [citing *Yee Hem* case].

Appellant suggests that since synthesis of morphine in a laboratory is now possible the presumption of illegal

⁹ Appellant contends also that there was testimony adduced at the trial contraverting the statutory presumption. The testimony referred to was not designated by appellant as part of the record on appeal and need not be considered by this Court. *Lau Lee v. United States*, 67 F.2d 156 (9th Cir. 1933). The testimony of the Government chemist, referred to by appellant (Br. 2, 3, 12), that chemical analysis would not reveal the origin of the contraband and appellant's bare denial of every allegation (Br. 12) was clearly not sufficient to rebut the presumption of illegal importation. Furthermore, the chemist's expressed opinion that the contraband was derived from an imported product strengthened the initial presumption.

A connected complaint was that the court "amended the indictment" in submitting the statutory definition of narcotic drugs to the jury (Br. 5, 7, 11). He did not designate the charge and consequently it, like the testimony, is not before this Court and need not be considered. *Preston v. United States*, 65 App. D.C. 110, 80 F.2d 702 (1935); *Conway v. United States*, 142 F.2d 202 (8th Cir. 1944). In any event, it was proper for the trial judge to so charge the jury, for such an instruction was necessary to legally define the term "narcotic drugs" as used in the Acts violated. Appellant's attorney also raised this issue in *Minor v. United States*, *infra*.

importation should be invalidated. The Senate report accompanying the 1953 Amendment¹⁰ indicated that although research chemists have evolved a method by which morphine may possibly be produced synthetically, the process "is complicated and not yet economically feasible. The possibility of synthesizing heroin has been recently rejected by this Court in its relation to the rationality of the statutory presumption. *Minor v. United States*, — U.S. App. D.C. —, (No. 13,471, January 24, 1957) and *Matthews v. United States*, *supra*.¹¹

A similar contention was made in *United States v. Holmes*, 187 F.2d 222 (7th Cir. 1951) *cert. denied*, 341 U.S. 948. It was there urged that the statutory presumption of importation from possession of heroin no longer existed in view of the enactment of the 1942 Opium Poppy Control Act which provided for emergency manufacturing of narcotic drugs in the United States.¹² The

¹⁰ Cited in footnote 7, *supra*.

¹¹ In both the *Minor* and *Matthews* cases counsel in the instant case contended, as here, that the rationality of the legislative presumption of importation from possession of heroin had been destroyed by the theoretical possibility of synthesizing the drug. This Court affirmed the convictions *per curiam* without comment on this particular claim of error. Similar contentions with reference to synthetic morphine and cocaine were considered unworthy of particular notice by this Court in *Turner v. United States*, 94 U.S. App. D.C. 418, 211 F.2d 652 (1954), *cert. denied* 348 U.S. 821; and *Roberts v. United States*, 88 U.S. App. D.C. 397, 190 F.2d 600 (1951), *cert. denied* 342 U.S. 855.

¹² 56 Stat. 1045, 21 U.S.C. Sec. 188 (1952). This act made unlawful the production of opium poppies except under a license issued as and when the Commissioner of Narcotics should determine such production to be necessary to supply medical and scientific needs of the nation of a narcotic drug. The Senate report accompanying the bill indicated one of its purposes was to secure an adequate supply of critical material should the war make impossible its import. Senate Report No. 1764, 77th Cong. 2nd Sess. 2 (1942).

Since our reserve supplies were adequate, no license was issued. Under the regulations adopted by the Commissioner of Narcotics, no license to produce the opium poppy or to manufacture opium or its products from opium poppies will be issued until he finds, "That the medical and scientific needs of the United States for

court, in affirming the conviction of violating the Narcotic Drugs Import-Export Act, said (187 F.2d at 224):

The Control Act now prohibits the growing of opium poppies in this country except under license. We have been informed that a license has never been issued. The annual report of the United States Treasury Department, Bureau of Narcotics, 1947 reports (P.D. 27, 28) that no opium was produced at that time in this country. We hold that the presumption provisions of 21 U.S.C.A., Sec. 174 are valid and are in full force and effect and that the defendant's conviction * * * must be sustained.

This Court may still judicially know, as it has before, that "opium is not commercially a domestic product" *United States v. Yee Fing*, 222 Fed. 154 (D. Mont. 1915); accord, *Casey v. United States*, *supra*, and the inferences permitted in 21 U.S.C. § 174 are valid and in full force and effect. There mere possibility of synthesis of narcotics does not require, as appellant would prefer, that the legislative presumption disappear from the case. To hold otherwise, would necessitate a construction that the statutory presumption had been repealed by implication, a practice rarely indulged in by most courts.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment below should be affirmed.

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narcotic drugs are not being or cannot be supplied from crude opium obtained by importation. * * *". 21 C.F.R. § 303.5, 303.8 (1955).

Importation of opium for the purpose of manufacturing heroin is specifically forbidden by law 21 U.S.C. § 173.

